No. 95-129

In The

Supreme Court of the United States

October Term, 1995

EXXON COMPANY, U.S.A., *et al.*,

Petitioners,

vs.

SOFEC, INC., *et al.*,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION BY THE MARITIME LAW ASSOCIATION OF THE UNITED STATES TO FILE *AMICUS CURIAE* BRIEF

Applicant, The Maritime Law Association of the United States ("MLA"), moves the Court for leave to file an *amicus curiae* brief in support of Petitioners, Exxon Company, U.S.A., *et al.* Petitioners have given consent to the MLA to file an *amicus* brief, but Respondents have refused to consent. Accordingly, Applicant seeks leave to file pursuant to Supreme Court Rule 37.4.

NATURE OF APPLICANT'S INTEREST

The MLA is a nationwide bar association founded in 1899, with a membership of about 3600 attorneys, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates. Its attorney members, most of whom emphasize their practice in admiralty law, represent all maritime interests – shipowners, charterers, cargo interests, port authorities, seamen, longshoremen, passengers, underwriters and other maritime claimants and defendants.

The purposes of the MLA, as stated in its Articles of Association, are to:

> . . . advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation . . . and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives, the MLA has sponsored a wide range of legislation dealing with maritime

matters during its ninety-seven years of existence, including the Carriage of Goods by Sea Act[1] and the Federal Arbitration Act.[2] The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[3]

The MLA also participates in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its commissions on trade law ("UNCITRAL") and trade and development ("UNCTAD") and works closely with the International Maritime Organization ("IMO"). The MLA also actively participates as one of some forty-nine national maritime law associations constituting the Comite Maritime International in the movement to achieve maximum international uniformity in maritime law through the medium of international conventions.[4]

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[1] 46 U.S.C. §§ 1300-1315.

[2] 9 U.S.C. §§ 1-5.

[3] E.g., 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; implementation of the 1972 Convention For Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted in* 6 BENEDICT ON ADMIRALTY, Doc. No. 3-4 at 3.35 to 3-78.2 (7th rev'd ed. 1995) (hereinafter "BENEDICT"), see 33 C.F.R. ch. 1, subch. D., Special Note at 160 (1987); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

[4] E.g., Assistance and Salvage (1910), 37 Stat. 1658 (1913), *reprinted in* 6 BENEDICT, Doc. No. 4-1 at 4-2 to 4-10; Ocean Bills of Lading (The Hague Rules) (1924), 120 L.N.T.S. 155, *reprinted in* 6 BENEDICT, Doc. No. 1-1 at 1-2 to 1-19; Collision (1910), *reprinted in* 6 BENEDICT, Doc. No. 3-2 at 3-11 to 3-19; Limitation of Liability of Owners of Sea-Going Ships (1957), *reprinted in* 6 BENEDICT, Doc. No. 5-2 at 5-11 to 5-29; Maritime Liens and Mortgages (1967), *reprinted in* 6A BENEDICT, Doc. No. 8-3 at 8-25 to 8-32; Civil Liability for Oil Pollution Damages (1969),

The MLA has filed *amicus* briefs as in a number of cases, including briefs accepted by this Court.[5] For example, in *Offshore Logistics, Inc. v. Tallentire*,[6] this Court agreed with the position advocated by the MLA and noted the MLA's role in relation to the matters at issue. The Court stated that:[7]

> The Maritime Law Association ("MLA"), an organization of experts in admiralty law and a prime force in the movement for a federal wrongful death remedy, drafted the bill that was enacted as DOHSA (the Death on the High Seas Act). . . . [T]he MLA, an expert body of maritime lawyers, had reason to fear that absent a savings clause [such as Section 7 of DOHSA], specifically recognizing the continued viability of this type of action, state wrongful death remedies on territorial waters might be deemed beyond the competency of state courts.

It is the policy of the MLA to participate as *amicus curiae* only when important issues of maritime law or practice are involved, and only when the impact of the Court's decision may be substantial. The Bylaws of the

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U.N.T.S. 1409, *reprinted in* 6 BENEDICT, Doc. No. 6-3 at 6-62.103 to 6-76.3; and Limitation of Liability for Maritime Claims (1976), *reprinted in* 6 BENEDICT, Doc. No. 5-4 at 5-32.1 to 5-44.3.

[5] *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *American Dredging Co. Inc. v. Miller*, ___ U.S. ___, 14 S. Ct. 981 (1994); *McDermott, Inc. v. AmClyde*, ___ U.S. ___, 114 S. Ct. 1461 (1994). For a more comprehensive listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

[6] *Id.*

[7] 477 U.S. at 223-24.

MLA require that its participation as *amicus curiae* must be approved by the President, in consultation with the First and Second Vice-Presidents, and then submitted to the Executive Committee. The Bylaws provide that such approval must be given sparingly, and only when one or more of the following criteria are met:[8]

(a) The outcome of the litigation would adversely affect the uniformity of maritime law.

(b) The outcome of the litigation would adversely affect traditional admiralty practice or procedure.

(c) The outcome of the litigation would adversely affect traditional admiralty jurisdiction.

(d) The outcome of the litigation would affect the meaning of a law or treaty advanced by the Association.

REASONS FOR REQUESTING LEAVE TO FILE THIS BRIEF AS *AMICUS CURIAE*

The MLA is seeking to file an *Amicus* brief because the decision of the courts below seriously undermines the uniform principles of the comparative fault doctrine articulated by this Court in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975). The decision further adversely affects traditional admiralty practice and procedure.

The parties to this litigation have presented or will present to this Court their views regarding this doctrine under the facts of this case and insofar as it affects the

[8] Bylaws of the Maritime Law Association of the United States, Section 500-13.

outcome of this litigation. Their law focus is reasonably and naturally concerned with that ultimate outcome. However, as reflected in the brief herein, the ultimate decision will affect the rules applicable to all maritime casualty and the potential interplay of the common law defense of cause.

The MLA's perspective, arising from its interest in the fair and effective administration of maritime law in the United States, is necessarily different from that of the parties to this suit. The MLA can comment objectively about the impact of this decision on the uniformity of maritime law regarding the issues presented. The MLA brief concentrates upon the underlying principles and how the common law defense might be employed without disruption to those principles, a consideration of no particular interest to the parties herein.

The MLA therefore respectfully moves for leave to file its brief herein.

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INTEREST OF AMICUS CURIAE

As recited in detail in the Nature of Applicant's Interest in the accompanying Motion, *supra*, MLA has a very strong interest in the disposition of this case. MLA is a nationwide bar association founded in 1899 and incorporated in 1993 with about 3,600 attorneys, law professors and others interested in maritime law.

The MLA's formal objectives include the advancement of reforms of maritime law, the promotion of uniformity and the facilitation of justice in the administration of maritime law. The MLA's attorney members represent all maritime interests – shipowners, charterers, cargo owners, shippers, forwarders, port and terminal authorities, stevedoring companies, seamen, longshoremen, passengers, marine insurance underwriters and brokers and other maritime plaintiffs and defendants.

The MLA has, in furtherance of the uniformity policy and resolutions, filed *amicus* briefs in a number of cases, including a number of briefs accepted by this Court.[1] It is the policy of the MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved or the Court's decision may substantially affect the uniformity of maritime law. Such a situation exists in this case.

[1] *See Note in Motion for Leave, supra.*

This case concerns the interplay of the comparative fault rule with the common law defense of superseding cause. The comparative fault rule was adopted by the Court in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), and is applicable to all marine collisions and strandings. It mandates the allocation of liability for marine casualties among the parties whose actions proximately caused the casualty in proportion to their fault. As applied by the courts below, the superseding cause defense could permit the exoneration of defendants from liability without any comparative analysis of their conduct and contributing fault. As applied, such a rule directly contravenes the comparative fault role and undermines the equitable goals of the maritime law.

SUMMARY OF THE ARGUMENT

In 1975 this Court adopted the rule of comparative fault in admiralty in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975). Therein, the Court held

> when two or more parties have contributed by their fault to cause property damage in a marine collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault . . .

Reliable Transfer, 421 U.S. at 411.

The comparative fault doctrine was adopted explicitly to achieve a fair and equitable allocation of damages resulting from marine casualties. The vitality and fairness of this doctrine have recently been reaffirmed by the

Court in two separate settings. *McDermott, Inc. v. AmClyde*, 511 U.S. ___, 114 S. Ct. 148 (1994) and *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, ___ U.S. ___, 115 S. Ct. 2091 (1995). Likewise lower courts have employed the doctrine's equitable standard to avoid harsh "all-or-nothing" results.

The question presented concerns the interplay of the common law defense of superseding cause with the comparative fault doctrine in admiralty. This common law defense is based upon a policy determination of when a party will be exonerated from responsibility for the consequences of its negligence because of the operation of subsequent or intervening causes. W. Page Keaton, *et al.*, *Prosser and Keaton on Torts* § 44, pp. 301-19 (5th ed. 1984) and *Restatement (Second) of Torts* (1965), § 440-444. This defense is not rooted in causation, but is derived from consideration of multiple factors bearing upon the conduct and fault of all parties and the anticipated or "foreseeable" consequences of the original negligence. Determination of these factors necessarily involves consideration of the conduct and fault of all parties involved in a casualty.

The trial and appellate courts below have applied this defense in a fashion which directly conflicts with the comparative fault rule. Under the auspices of this defense, the trial court considered the degree of culpability of only the plaintiffs and failed to examine the conduct of defendants and evaluate the nature and degree of their potential contributive fault. When applied in this fashion, the common law defense violates the tenets of *Reliable Transfer* and directly contravenes the

goal of achieving a fair and equitable allocation of damages.

ARGUMENT

The brief of *Amicus* MLA addresses only the first question presented:

> After this Court decided *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), may an admiralty court exonerate defendants from all liability to a shipowner for the loss of its tanker when defendants conceded that their breaches of maritime duties imposing strict liability in tort and negligence were causes-in-fact of the vessel's stranding because the court found that the tanker's captain was grossly negligent in navigating the imperiled vessel?

Amicus respectfully submits that the court may not exonerate defendants in such a setting without consideration of the potential fault of all parties whose conduct caused or contributed the casualty pursuant to the comparative fault doctrine announced in *Reliable Transfer, supra.*

I.

THE COMPARATIVE FAULT DOCTRINE

In *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), the Court adopted the rule of comparative fault in admiralty, holding that

> when two or more parties have contributed by their fault to cause property damage in a marine

> collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault . . .

Reliable Transfer, 421 U.S. at 411.

Reliable Transfer concerned the stranding of the Tanker MARY A. WHALEN when she navigated too close to Rockaway Point breakwater outside New York Harbor. More than half an hour before the casualty, the captain had observed that the flashing light, when had normally marked the southernmost point of the breakwater, was not operating. In subsequent maneuvers culminating in the grounding, the captain used only "his own guesswork judgment," without the assistance of the available lookout, chart, searchlight, radio-telephone and radar. *Id.* at 399. Wrongly believing the tanker's course would clear the breakwater, the captain steered a course too close to Rockaway Point, and the tanker grounded.

The trial court found the grounding was attributable 75% to the tanker's fault and 25% to the failure of the Coast Guard to maintain the light. Both the district court and the appellate court applied the existing divided damages rule, and the United States was held liable for one-half of the vessel's damages even though the Coast Guard was found only 25% at fault.

After granting certiorari, this Court acknowledged the traditional leadership role of the courts in "formulating flexible and fair remedies in the law maritime." *Reliable Transfer,* 421 U.S. at 409, and jettisoned the 120-year-old divided damages rule as "archaic," "unfair" and "unjust." *Id.* at 405-11.

The Court further noted that the inequities of the old rule were aggravated by the *Pennsylvania* rule when a party, guilty of even minor statutory fault, was held liable for half of the damages unless that party could satisfy the heavy burden of proving that its fault could not have contributed to the incident. *Reliable Transfer,* at 405, 406; *The* PENNSYLVANIA, 86 U.S. (19 Wall.) 125 (1874). The Court noted the development of the major-minor fault rule which attempted to avoid the iniquities of the divided damages rule by holding a "grossly negligent" party solely responsible. However, the court found that this exception was "inherently unreliable [and] simply replace[d] one unfairness with another." *Reliable Transfer,* 411 U.S. at 406. Discounting arguments that the divided damages rule promoted settlements and reduced court congestion, the Court concluded that "the 'just and equitable' allocation of damages" could better be served under principles of comparative fault. *Id.* at 410, 411.

II.

THE FAIRNESS OF THE COMPARATIVE FAULT RULE

The comparative fault rule in admiralty has recently been reaffirmed by the Court in two separate settings. In *McDermott, Inc. v. AmClyde,* 511 U.S. ___, 114 S. Ct. 148 (1994), this Court recognized and relied upon the fundamental fairness of this doctrine in announcing the maritime rule for allocating responsibility among multiple parties, whose fault cause a marine casualty, after one of the parties has settled. After weighing policy considerations of judicial economy and promotion of settlements. the Court adopted the rule which allows a credit in favor

of the non-settling tortfeasors in proportion to the settler's comparative fault. The decision specifically acknowledged the proportional credit rule best complemented the equities achieved by the comparative fault doctrine. *McDermott,* 551 U.S. at ___, 114 S.Ct. at 1467-70.

More recently, the Court again acknowledged the underlying equity of the Reliable Transfer rule in *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.,* ___ U.S. ___, 115 S. Ct. 2091 (1995). There the Court considered a challenge that the imposition of prejudgment interest was unfair as to a party guilty of only minor fault. Upholding the traditional admiralty rule allowing for prejudgment interest in absence of peculiar circumstances, the Court commented that "any unfairness [of the prejudgment interest award] is illusory, because the relative fault of the parties has already been taken into consideration" by apportioning responsibility for the damages in respect of the fault of each party. *City of Milwaukee,* 115 S. Ct. at 2097.

Lower federal courts have likewise found the comparative fault doctrine adaptable to multiple situations[2] and useful in reaching fair results involving disparate issues arising from maritime casualties. 2 Thomas J. Schoenbam, *Admiralty and Maritime Law* (2d ed. 1994), § 14-4, pp. 270-73. Utilizing the doctrine's latitude, courts

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[2] *See, e.g. Complaint of American Export Lines, Inc.,* 620 F. Supp. 490 (S.D.N.Y. 1985); *Seal Offshore, Inc. v. American Standard, Inc.,* 777 F.2d 1042 (5th Cir. 1985); *Sonat Marine, Inc. v. Belcher Oil Co.,* 629 F. Supp. 1319 (D.N.J. 1985), *aff'd* 787 F.2d 583 (3d Cir. 1986).

can avoid the inequities of "all or nothing" rulings premised upon rigid common law concepts such as "last clear chance" and active-passive indemnity. *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493 (5th Cir. 1982); *S. C. Loveland v. East-West Towing, Inc.*, 608 F.2d 160, 169, *cert. denied sub nom. St. Paul Mercury Ins. Co. v. East-West Towing, Inc.*, 446 U.S. 918 (1980), *reh. denied*, 611 F.2d 882 (1980), *aff'g*, 415 F. Supp. 596, 606-7 (S. D. Fla. 1976), *cf. Nunley v. M/V* DAUNTLESS COLOCOTRONIS, 727 F.2d 455, 466 (5th Cir. 1984) (*en bank*), *cert. denied sub nom. Dravo Mechling, Inc. v. Combi Lines*, 469 U.S. 832 (1984). These doctrines like the former major-minor fault exception to the divided damages rule were formulated to navigate around the harsh results compelled by rigid rules, which prohibited proportional contribution among joint tortfeasors or enforced contributory negligence as a complete bar to recovery. *Loose*, 670 F.2d at 500-502. However, with the advent of the comparative fault rule, the lower courts have been unshackled from inflexible rules[3] and now allocate responsibility for marine casualties in accord with the comparative faults of all contributing interests.

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[3] As indicated by the late Circuit Judge Rubin in *Loose*, "concepts of active and passive negligence have no place in a liability system that considers the facts of each case and assesses and apportions damages among joint tortfeasors according to the degree of responsibility of each party." *Loose*, 670 F.2d at 502.

III.

THE INTERPLAY OF THE DEFENSE OF SUPERSEDING CAUSE WITH THE COMPARATIVE FAULT DOCTRINE

The question presented arises out of the interplay of the common law defense of superseding cause with the maritime comparative fault rule. The conflict of authorities concerning the application of this defense in admiralty has been outlined in the Ninth Circuit opinion below as well as the petition for certiorari.[4] *Amicus* does not contend that this defense is never applicable in admiralty. However, *Amicus* submits that the defense should be applied only in harmony with the equitable principles of the comparative fault doctrine. In particular, the trial court should examine the conduct of all parties and evaluate comparative fault of each so that the court can fairly and properly either allocate responsibility among the respective interests whose fault cause or contribute to a casualty or exonerate any party whose conduct or fault did not.[5]

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[4] *Exxon Co. v. Sofec, Inc.*, 54 F.3d 570 (9th Cir. 1995); *Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069, 1075 (11th Cir. 1985); *Lone Star Indus., Inc. v. Mays Towing Co.*, 927 F.2d 1453 (8th Cir. 1991); *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497 (9th Cir. 1991); *Nunley v. M/V* DAUNTLESS COLOCOTRONIS, 727 F.2d 455, 466 (5th Cir. 1984) (*en banc*); *see also*, generally, *Schoenbaum, supra*, at Vol. 1, § 5-34, pp. 165-67; Note, *Abandon Ship? The Need To Maintain A Consistency Between Causation In Admiralty and Common Law Tort; Lone Star Industries, Inc. v. Mays Towing Co.*, 25 Creighton L. Rev. 1007 (1992).

[5] The trial court below seemed to acknowledge and partly agree with this requirement in its Bifurcation Order:

A. The Decisions Below

During the Phase One trial, the trial court considered only the conduct of plaintiffs (navigation following breakout). Relying upon the common law concept of superseding cause, the trial court exonerated the defendants, finding that the "extraordinary negligence" of the plaintiffs was the sole proximate cause of the collision, but without considering the conduct of defendants or determining the nature or degree of their potential contributing fault. *Exxon Company, et al. v. Sofec, Inc., et al.*, Civ. No. 90-00271 HMF (May 20, 1994), Appendix D to Petition for Certiorari, App. 61-66.

In its affirmance, the Ninth Circuit indicated that the trial court had "assumed that the defendants' negligence was a cause in fact of the grounding." *Exxon Co. v. Sofec, Inc.*, 54 F.3d at 570, 575 (9th Cir. 1995). The Court further

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> As discussed earlier, a determination of whether the master's alleged negligence is an intervening, superseding cause, which would cut off defendants' liability at the point of the intervening event, requires an examination of all the claimed causes of the casualty. *See Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 1991 A.M.C. 1217 (9th Cir. 1991); *White v. Roper*, 901 F.2d 1501 (9th Cir. 1990).

Bifurcation Order, App. E to Petition for Certiorari, App. 82-83 (emphasis added). However, the court offered a different view following the Phase One trial when it concluded that "[d]etermining the causes of the breakout is not necessary to a determination of whether [plaintiff's] navigation was a superseding intervening cause of the stranding." *Exxon Company, et al. v. Sofec, Inc.*, Civ. No. 90-00271 HMF (May 20, 1994), Appendix D to Petition for Certiorari, App. 61-66, Conclusion of Law 43, App. 63.

noted that "if [the trial court] did not find [the] navigation after the breakout to be the sole proximate or superseding cause of the grounding, it could 'still determine in the first phase of the bifurcated trial the comparative fault (cause) of the grounding as between the breakout and the subsequent navigation[6] of the vessel'." *Exxon*, 54 F.3d at 575; *see*, Bifurcation Order, Appendix E to Petition for Certiorari, App. 82. Although no such determination was made, the Ninth Circuit affirmed the trial court judgment, upholding as not clearly erroneous the finding that the extraordinary negligence of the plaintiffs was the sole proximate and superseding cause of the grounding. *Exxon*, 54 F.3d at 576-79.

B. The Nature Of The Superseding Cause Defense

The approach of the trial court, as affirmed by the Ninth Circuit, is inconsistent with the comparative analysis required under *Reliable Transfer*. It is likewise, *Amicus* submits, in conflict with the common law considerations necessary to establish the defense of superseding cause.

While the common law denominates this defense under the general concept of causation, it is not, at bottom, rooted in causation, but in considerations of fault. The defense of superseding cause has its bedrock in the judicial policy of determining when an initial actor may

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[6] This language seems to equate the events (breakout and navigation) with the conduct or culpability of the parties. While these events were certainly causes of the casualty, *Amicus* respectfully submits that the trial court should have examined the conduct and relative culpability of the parties involved in those events (breakout and navigation).

be exonerated from the liability for the consequences which its negligence has caused because of the operation of an intervening or subsequent cause.[7] *See* generally, W. Keaton, *et al., Prosser and Keaton on Torts* § 44, pp. 301-19 (5th ed. 1984).

Common law premises this policy determination upon multiple factors involving the scope of the original actor's duty and fault and their interplay with subsequent causes and the ultimate harm. *Prosser & Keaton*, § 44; *Restatement (Second) on the Law of Torts*, § 440-444. For example, when the subsequent causes are "foreseeable" or "natural" following the original actor's neglect, the original actor is typically liable in spite of the subsequent cause.[8] *Prosser & Keaton*, § 44 at pp. 303-11, *see also*, *Restatement*, § 443, at 472 (1965).

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[7] As described in *Prosser & Keaton*:

> the problem is one of whether the defendant is to be held liable for an injury to which the defendant has in fact made a substantial contribution when it is brought about by a later cause of independent origin for which the defendant is not responsible. In its essence, however, it becomes again a question of the extent of the defendant's original obligation; and once more the problem is not primarily one of causation at all, since it does not arise until cause in fact is established. It is rather one of the policy as to imposing legal responsibility.
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> • • •
>
> It must be conceded that "intervening cause" is a highly unsatisfactory term, since we are dealing with problems of responsibility, and not physics.

Prosser & Keaton, § 44, pp. 301, 302.

[8] Once again, the legal terminology of "foreseeable" and "natural" does not quite coincide with everyday meaning or

The appellate and trial court opinions relied heavily upon the *Restatement* guidelines. *Restatement* § 442(a)-(e) delineates several important considerations in determining whether a subsequent cause (intervening force) constitutes a superseding cause which absolves the original actor from liability. These considerations include, *inter alia*, whether harm from the intervening force is different in kind from that which would have resulted from the original negligence; whether the "operation" or "consequences" of the intervening force are "extraordinary" or "normal" in view of the "circumstances existing"; and whether the intervening force operates independently of the situation created by the original actor's negligence. *Restatement*, § 442(a), (b), (c) at pp. 467, 468. As noted in the decisions below, Section 442(f) further suggests consideration of the "degree of culpability" of the subsequent actor which "sets the intervening force into motion."

These *Restatement* factors require an examination of the conduct of both original and later actors. A determination is needed as to the kind of harm anticipated

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define the actual scope or limits of the initial actor's liability. As noted in *Prosser & Keaton*, "[i]t is perhaps a pointless quibble over the meaning of a term [foreseeable] to debate whether such normal intervening causes are to be called 'foreseeable.' They are at least foreseeable in the sense that any event which is not abnormal may reasonably be expected to occur now and then, and would be recognized as not highly unlikely if it did suggest itself to the actor's mind. They are closely and reasonably associated with the immediate consequences of the defendant's act and form a normal part of this aftermath and to that extent they are not foreign to the scope of the risk created by the original negligence." *Id.* at 306, 307.

from the fault of each, and the "circumstances existing" should be examined to determine whether the "operation" or "consequences" of the subsequent cause was "normal" or "extraordinary." *Id. Restatement* § 442B states that "[w]here the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct." Section 444 would further impose liability upon the original actor when the subsequent act is "a normal response to fear or emotional disturbance" brought about by the original actor's negligence.[9]

C. Application Of Superseding Cause In Admiralty

This Court has long recognized the importance of the uniform maritime law. *The Lottawana*, 88 U.S. (21 Wall.) 558, 575 (1875); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160 (1920). State laws and jurisprudence may not be applied in a fashion which would "contravene the essential purposes of, or to work material injury to, characteristic features of [the maritime] law or to interfere with

[9] This particular factor parallels a long-held principle in admiralty under which a navigator's error in judgment is held to be excusable when committed *in extremis*, that is, under the stress of the emergency created by another. *The Blue Jacket*, 144 U.S. 371, 392 (1892); *The Oregon*, 158 U.S. 186, 204 (1895); John W. Griffin, *The American Law of Collision* § 233, pp. 529-32 (1949).

its proper harmony and uniformity in its international and interstate relations". *Knickerbocker, Inc.*, 253 U.S. at 160; *see also, Kossick v. United Fruit Co.*, 365 U.S. 731 (1961); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 631 (1959). In *Kermarec*, this Court refused to apply the different standards of care under common law for invitees and licensees to the claims of visitors injured aboard vessels. The Court explicitly declined to "import such conceptual distinctions [which] would be foreign to [maritime law's] traditions of simplicity and practicality." *Id.* at 631.

There is unquestionably inherent tension between the comparative fault rule and this common law defense. When the defense is premised upon the degree of fault of one party only, this conflict between the doctrines is most apparent. In particular, the inequities associated with the interplay of the *Pennsylvania* and major-minor fault rules, as noted in *Reliable Transfer*, 411 U.S. at 405, 406, arise with even greater force from the interplay of the *Pennsylvania* rule and the superseding cause defense, especially when the latter is premised upon the culpability of only one party. As applied by the courts below, this common law defense directly contravenes the "just and equitable" allocation of damages which was the explicit goal of *Reliable Transfer. Id.* at 411.

Acknowledging this tension, *Amicus* respectfully submits that this defense will only rarely[10] be applicable in

[10] As a practical matter, after *Reliable Transfer*, it is neither necessary nor desirable to apply the superseding cause doctrine

admiralty. When applicable, however, it must be applied in harmony with the equitable principles underlying the comparative fault doctrine. Of necessity, therefore, the trial court should always examine the conduct of all parties and the interplay of their conduct with the marine casualty before the court can either allocate liability on the basis of the comparative fault of the parties or exonerate any party under this common law defense. When thus applied in admiralty, this doctrine will be coordinated with the analysis of the comparative fault of all parties under *Reliable Transfer.*

Some courts have applied this defense appropriately.[11] The *en banc* decision of the Fifth Circuit in

to most marine casualties. The comparative fault approach accommodates most factual circumstances in a fashion which allocates liability after weighing the relative duties of all parties, the nature and degree of their faults and the circumstances existing and acting upon them. For example, in *Reliable Transfer,* the liability was allocated between parties whose contributing faults were distinctly different in operation, nature and degree. The government's fault concerning condition of the breakwater light was very different in all respects from the captain's fault with respect to the navigation of the tanker. Indeed, the condition of the light did not create any emergency, and the captain was aware of that condition long before he negligently navigated the vessel. Acknowledging that *Reliable Transfer* did not consider defense of superseding cause, it is nonetheless obvious that this common law rule defense should be relegated to those rare circumstances where the nature, degree, operation and effect of the parties' fault are so disparate and remote that the chain of causation is effectively broken. Such a determination, however, can be made only after consideration of the conduct and fault of all parties.

[11] *See,* generally, *Note, Abandon Ship? The Need to Maintain a Consistency Between Causation In Admiralty and Common Law Tort:*

Nunley v. M/V DAUNTLESS COLOCOTRONIS, 727 F.2d 455 (5th Cir. 1984), reflects such an approach. The Fifth Circuit therein examined the application of this doctrine in a maritime casualty in the wake of *Reliable Transfer. Nunley* concerned the legal responsibility for a collision between the DAUNTLESS COLOCOTRONIS and a sunken wreck. The wreck had not been marked or removed by its owner or the United States. It was, however, contended that third parties ("upriver defendants") were responsible for the sinking of the wreck and were therefore liable for this collision, which occurred some three years after the sinking. The district court granted a judgment on the pleadings in favor of the upriver defendants on the grounds that pursuant to the Wreck Act, 33 U.S.C. § 409, the sole proximate cause of the collision was the failure to mark or remove the sunken wreck by the owner or the United States.

Examining the relationship between the superseding cause defense and the comparative fault doctrine, the Fifth Circuit held:

> Should either the owner or the United States be held liable [for failing to mark or remove the wreck], however, their negligence cannot be regarded, *per se,* as superseding cause exonerating the negligent tortfeasors [upriver defendants] from any liability whatsoever for damages primarily resulting from their negligence, and *under ordinary admiralty tort principles the causal initial negligence of the upriver defendants that contributed to the later accident should*

Lone Star Industries, Inc. v. Mays Towing Co., 25 Creighton L. Rev. 1007 (1992).

> *make them liable for their apportioned share of the loss. See United States v. Reliable Transfer Co.*, 421 U.S. 397, 411, 95 S.Ct. 1708, 1715-16, 44 L.Ed.2d 251 (1975).

Nunley, 727 F.2d at 462 (emphasis supplied).

The Fifth Circuit analysis includes a full exposition of the common law considerations underpinning the superseding cause defense. *Nunley*, 727 F.2d at 463-66. Ultimately, the Court remanded the case for further proceedings during which the conduct of all parties would be evaluated in light of comparative fault principles under *Reliable Transfer* as well as the potential application of the superseding cause defense. *Id.* at p. 467.

The *Nunley* decision recognized the rare potential application of the superseding cause defense in harmony with the comparative fault analysis under *Reliable Transfer.*[12] It is noted that the decisions[13] cited by the Ninth Circuit, which applied this defense, did not suggest that the conduct and fault of the defendants need not be considered. Generally, the trial courts involved in those

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[12] *See also Lone Star Industries, Inc. v. Mays Towing Co.*, 927 F.2d 1453 (8th Cir. 1991) and the superb analysis of Judge Friendly, involving similar considerations and conflicts under the former divided damages rule in *Petition of Kinsman Transit Co.*, 338 F.2d 708, 721-26 (2d Cir. 1964), *cert. denied sub nom. Continental Grain Co. v. Buffalo*, 380 U.S. 944 (1965).

[13] *See* note 4, *supra*. The Ninth Circuit also cited *Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646 (5th Cir. 1992) (reversing summary judgment premised upon the superseding cause defense) and the *dicta* in *Protectus Alpha Navigation Co. v. Northern Pac. Grain Growers*, 767 F.2d 1379, 1384 (9th Cir. 1985).

cases reviewed the conduct of all parties, and not just that of the final or subsequent actor.

In the decision below, the defendants were exonerated following the Phase One trial when the district court had examined only plaintiffs' conduct and evaluated the degree of only plaintiffs' culpability. The court made no examination, evaluation or finding concerning defendants' conduct or culpability. In premising its dismissal upon the degree of fault of the plaintiff only without considering the conduct of the defendants, the trial court manifestly violated the tenets of the comparative fault doctrine.[14]

Amicus respectfully submit that the application of the superseding cause doctrine in this fashion is irreconcilable with the comparative fault doctrine and directly contravenes the goal of a just and equitable allocation of damages of this uniform maritime rule.

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[14] The decision directly conflicts with *Reliable Transfer*, effectively applying the extinct major-minor fault exception to the divided damages rule (i.e. gross negligence of one party absolves slight negligence of the other) following proceedings in which the defendants' conduct in causing this casualty was never proven to be less culpable than plaintiffs' conduct.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully submits that the judgments below should be vacated subject to further proceeds consistent with the comparative fault doctrine.

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